

No. 14654

United States
COURT OF APPEALS
for the Ninth Circuit

MILDRED E. McCAN,

Appellant,

vs.

THE FIRST NATIONAL BANK OF PORTLAND,
a national banking association,

Appellee.

BRIEF OF APPELLEE

*Appeal from the United States District Court for the
District of Oregon.*

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FILED ⁷⁻⁵⁵

AUG -8 1955

PAUL P. O'BRIEN, CLERK



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BRIEF OF APPELLEE

*Appeal from the United States District Court for the
District of Oregon.*

**STATEMENT OF THE PLEADINGS
AND FACTS**

On November 9, 1953 a pre-trial order was entered in this case "concerning jurisdictional and related issues" (R. 14, 29). This order contained a statement of agreed facts and provided that "the making and entry of this pre-trial order shall, with respect to the issues hereinabove reserved for pre-trial, supersede the pleadings" (R. 29). The order was signed by the District Judge, and

approved in writing by plaintiff's attorney and defendant's attorney (R. 29).

Appellant's Opening Brief contains numerous allegations and innuendoes not supported by the pre-trial order and many not even set forth in the Complaint, which operate to place the plaintiff in a more sympathetic position than is warranted by the record.

Examples are plaintiff's statements on page 4 of her brief, "The Bank ignored letters sent by her to it and the personal visits of the social worker of the State Hospital" and "Repeated demands and requests were made for funds from the end of January 1952 to the end of May 1952 without acknowledgement by the Bank." Another example is the statement on page 3 of Appellant's Opening Brief that the decedent's daughter by an earlier marriage petitioned to have plaintiff declared incompetent and committed to the State Hospital "to reduce her father's expenses". Again, on page 12 of Appellant's Brief, appellant states that the employees of the trust department of a corporate trustee "have no personal relationship with the beneficiaries of the estates" to the end that "the wishes of a decedent are not carried out with respect to looking after the welfare of his loved ones".

Although Appellant's Brief, in the statement of facts and elsewhere, contains these and other allegations that are not only unsubstantiated by the record but immaterial to the issue before the Court, an analysis of each such statement would considerably increase the size of this brief without shedding additional light on the issue be-

fore the Court and we will therefore not comment further on the purported facts set forth in Appellant's Brief.

C. P. McCan died on December 19, 1951 at which time his widow, Mildred E. McCan, plaintiff and appellant herein, was a patient at the Oregon State Hospital at Salem, Oregon (R. 14, 15). The First National Bank of Portland, defendant and appellee herein, was appointed executor of the Last Will and Testament of C. P. McCan on January 9, 1952 by the Probate Court of Multnomah County (R. 15). On June 16, 1952 plaintiff filed a petition in the Probate Court for an order directing the executor to pay her \$1,000.00 from the estate for her support from the date of death of the decedent to the date of said petition (R. 16). On June 23, 1952 the Probate Court entered an order directing the executor to pay forthwith to the plaintiff the sum of \$500.00 as support money for the period prior to the filing of the Inventory and Appraisement (R. 17). This sum was paid by the defendant to the plaintiff on June 16, 1952 (R. 19).

On June 23, 1952 the Probate Court entered an order granting defendant until July 18, 1952 to file the Inventory and Appraisement in the McCan Estate and defendant filed the Inventory and Appraisement on July 18, 1952 (R. 17). On July 29, 1952 plaintiff petitioned the Probate Court for a widow's allowance continuing for a period of one year after the filing of the Inventory and Appraisement (R. 18). On July 31, 1952 the Probate Court entered an order granting plaintiff a widow's allowance consisting of monthly payments of \$300 each

during the year following July 18, 1952 and this order was granted after a hearing at which plaintiff and her attorney appeared (R. 18, 19). Defendant paid the plaintiff \$300 on July 18, 1952 and monthly thereafter for 12 months (R. 19). After being first paroled, plaintiff was discharged from the Oregon State Hospital on July 29, 1952 (R. 15).

On July 30, 1953 defendant filed its Final Account as executor of the McCan Estate with the Multnomah County Probate Court, setting forth its conduct of which plaintiff complains in this proceeding, and requesting that the Probate Court approve the account and discharge the defendant, as executor, from all liability to any person including the plaintiff by reason of any matter involved in the administration of the estate (R. 19). Plaintiff filed objections to the account (R. 20) and the hearing on the objections is now pending.

Plaintiff alleges that negligence of defendant proximately caused plaintiff's continued confinement in the Oregon State Hospital from February 1, 1952 to June 2, 1952, subjecting her to suffering for which she seeks damages. Plaintiff alleges that defendant was negligent in failing to file an Inventory and Appraisement prior to July 18, 1952, in withholding information from her and others, and in failing to provide plaintiff with reasonable support moneys from the estate of her deceased husband during the period from February 1, 1952 until June 17, 1952.

The District Court considered only the jurisdictional question and dismissed this action on the ground that the

Court was without jurisdiction of the subject matter. (See Opinion of the lower court, beginning on p. 30 of the Record and Judgment beginning on p. 37 of the Record).

STATEMENT OF THE CASE

The issue before this Court is whether the United States District Court has jurisdiction to determine certain questions material to plaintiff's alleged right to damages in this case.

Plaintiff has attempted to allege facts constituting a cause of action for damages arising out of defendant's alleged negligent administration of the Estate of C. P. McCan. A judgment for the plaintiff on the merits of this case would determine, among other things, that defendant, as Executor, owed plaintiff a duty to exercise a degree of care in the administration of the Estate of C. P. McCan, and that the conduct of defendant constituted a violation of this duty of care.

The particular duties which plaintiff contends existed, and which plaintiff alleges defendant violated, are as follows:

(1) Defendant, in its capacity as Executor of the Last Will and Testament of C. P. McCan, deceased, should have filed the Inventory and Appraisement of the estate with the Probate Court on some date earlier than July 18, 1952, the date on which the Executor filed the Inventory and Appraisement with the Probate Court;

(2) Defendant, in its capacity as such Executor, should have made information of some sort concerning the estate available to plaintiff, her representatives and representatives of the State of Oregon, between February 1, 1952 and June 6, 1952;

(3) Defendant, in its capacity as such Executor, should have given funds from the estate to the plaintiff as a widow's allowance on some date prior to June 16, 1952, the date on which defendant commenced payment of a widow's allowance to plaintiff.

It is the contention of the defendant that only the Probate Court of Multnomah County has jurisdiction to determine whether such duties existed, and whether defendant's conduct as Executor violated any such duties as might have existed. If the United States District Court has no jurisdiction to determine these questions, then that Court has no jurisdiction over the subject matter of this action since a favorable determination of these questions is essential to plaintiff's right to any recovery.

Actually, all damages claimed flow from the failure to receive a widow's allowance in February 1952, rather than in June 1952. The alleged delay in filing the inventory and the alleged failure to give an undisclosed type of information are merely collateral to the claimed delay in receiving the allowance. Filing the inventory or giving information would not have freed the plaintiff from the hospital. Under her own allegations, her release was held up solely because of the failure to have means of support then available. Moreover, the time for filing the inventory and the giving of information by an executor are equally matters for the probate court.

As noted above, the District Court considered only the jurisdictional question, and dismissed the action solely because the court was without jurisdiction of the subject matter. In spite of this, appellant devotes most of her brief to advocating that her Complaint states a cause of action. If ever a similar Complaint is filed in a court having jurisdiction of the subject matter, it will be our contention that the Complaint should be dismissed for failure to state a cause of action. However, the arguments and authorities on the cause of action question are different from the arguments and authorities on the jurisdictional question, and the defendant will not burden this brief by arguing a question not considered by the lower court.

To illustrate the point that the two questions, although related, require separate consideration, we will mention only a few of the many legal issues raised by the cause of action question, but not directly raised by the jurisdictional question:

(a) Whether an executor owes anyone, other than the Probate Court, a legal duty to carry out the requirements of the Probate Code;

(b) Whether defendant's alleged conduct violated the Probate Code or was in any way improper;

(c) Whether the Probate Court orders under which defendant acted bar plaintiff by the doctrine of *res judicata*;

(d) Whether plaintiff's failure to file timely petitions in the Probate Court, seeking orders directing the executor to do as plaintiff wished, bars her now;

(e) Whether proper care and treatment in a mental hospital, not accompanied by physical injury, can constitute compensable injury in a negligence action.

The lower court properly restricted itself to the jurisdictional question, since by holding that it was without jurisdiction over the subject matter, it determined that it had no jurisdiction to consider whether a cause of action was stated.

EXPLANATION OF STATUTORY REFERENCES

Many Oregon statutes are referred to in this brief. At the time this action was filed, the Oregon Compiled Laws Annotated (cited as OCLA) was the current compilation of Oregon statutes. On January 1, 1954, a new code, Oregon Revised Statutes (cited as ORS), became effective. While the current statutes cited herein were not changed in any material particular, the Oregon Revised Statutes contains some slight changes in wording and arrangement, and omits statutes no longer in effect which we have cited for historical background. Since this action involves the law as it was prior to January 1, 1954, we have cited and quoted from the statutes as found in OCLA, but have also inserted references to the similar ORS section where appropriate. The material portion of each Oregon statute cited herein is set forth either immediately after the citation or in the Appendix.

ARGUMENT

Only a court with probate jurisdiction can determine a question intimately connected with the administration of an estate, and neither the United States District Court nor the general courts of Oregon have probate jurisdiction.

The trial judge succinctly stated the basis for the court's rejection of jurisdiction when he said:

"The acts charged against the administrator here are all inextricably woven into the administration of the estate." (R. 33), and

"If the action of the Probate Court can be controlled in administration of an estate by such interference (referring to the trial of appellant's action in federal court), its exclusive jurisdiction over this subject matter has been dissipated." (R. 34).

Appellant's brief not only pointedly ignores this logic but fails to cite a single authority to dispute the view that the subject matter of her claim is exclusively within the jurisdiction of the Oregon probate courts. It even refers (Appellant's Brief, p. 9), without demonstrating their inapplicability, to two of the Oregon decisions, *National Surety Corporation v. McArthur*, 174 Ore. 376, 149 P. (2d) 328 (1944), and *Cass v. Harder*, 153 Ore. 637, 58 P. (2d) 618 (1936), cited by the trial judge, which clearly sustain this exclusive jurisdiction of the probate court in matters of the kind here at issue.

As the trial judge observed (R. 34), "interference by the federal courts in these purely domestic affairs would be intolerable" for "the Tenth Amendment protects the exclusive jurisdiction of the state over such matters."

Originally, in Oregon, exclusive jurisdiction over probate matters was vested in the county courts. OCLA 13-501. In Multnomah County this exclusive probate jurisdiction was transferred to the Circuit Court. OCLA 13-206. However, probate jurisdiction is exercised by the Department of Probate of the Circuit Court for Multnomah County, which Department when so acting does not possess general jurisdiction, and other departments of the Circuit Court exercise general jurisdiction but when exercising such jurisdiction do not possess probate jurisdiction. *Arnold v. Arnold* 193 Ore. 490, 237 P. (2d) 963, 239 P. (2d) 595 (1951). For the sake of convenience this brief will follow the example of the opinion in the *Arnold* case, and refer to the "Probate Court of Multnomah County", rather than the more correct but also more cumbersome "Department of Probate of the Circuit Court of the State of Oregon for the County of Multnomah".

In Oregon, probate jurisdiction includes the authority and duty to control and supervise the conduct of executors.

OCLA 13-501. "The county court has the exclusive jurisdiction, in the first instance, pertaining to a court of probate; that is:

* * *

(3) To direct and control the conduct, and settle the accounts of executors, administrators and guardians;

* * *."

OCLA 19-226. "* * *; and it is the duty of the court or judge thereof to exercise a supervisory control over an executor or administrator, to the end

that he faithfully and diligently perform the duties of his trust according to law."

Probate jurisdiction, consisting of immediate and continued supervision and control of the conduct of personal representatives and ascertainment of probate rights and duties, by a court, as practiced in this country, was not known to the English common law judicial system. The practice is peculiar to the states of this country. Our probate courts administer probate rights and duties which are, in the main, of purely local, statutory origin.

In England, on the other hand, the equity courts did entertain suits involving a personal representative where his acts as executor might be subjected to judicial scrutiny and relief, but there was no court which exercised the initial, direct, supervisory control of our probate courts.

Woerner, American Law of Administration, Sections 141, 156.

Woerner, *supra*, in Sec. 156 makes the following statement:

"The general tendency is to vest exclusive original jurisdiction over executors * * * in Probate courts, arming them with ample powers both in the extent of their jurisdiction and their mode of procedure, for the accomplishment of their purposes which could not be obtained in the English testamentary courts and rendered necessary the interference of equity courts."

Plaintiff's entire argument on the jurisdictional question rests on the rule that where diversity of citizenship

and the jurisdictional amount are present, the Federal District Court has concurrent jurisdiction with the general trial courts of the state in which the federal court is sitting (Appellant's Brief, pp. 6, 7). Plaintiff, however, does not cite a single Oregon case in which a court of general jurisdiction took jurisdiction to determine a purely probate issue or attempted to review the administration of a decedent's estate in order to pass upon the propriety of a personal representative's conduct.

Plaintiff virtually concedes that the general courts of Oregon do not have jurisdiction over such matters when plaintiff states (Appellant's Brief, p. 9): "The Supreme Court of Oregon has refused to concede general court jurisdiction of matters within the exclusive jurisdiction of the probate court." The two Oregon cases, which we will discuss subsequently, cited by plaintiff following this statement clearly demonstrate that Oregon state courts of general jurisdiction do *not* have jurisdiction to decide purely probate or administrative questions, and the conclusion necessarily follows that the Federal District Court for the District of Oregon likewise does not have jurisdiction.

As stated above, Oregon is one of the many states that vested *exclusive* probate jurisdiction in its probate courts. Because of the supervisory control over executors and the exclusive probate jurisdiction exercised by Oregon probate courts, Oregon courts of general jurisdiction have never entertained proceedings involving determination of matters intimately connected with the administration of estates.

In *Winkle v. Winkle*, 8 Ore. 194 (1879), a suit was brought in a court of general jurisdiction to declare a constructive trust as to a certain personal property that had been set apart for the widow by the Probate Court as exempt property. Plaintiff alleged that the widow entered into an ante-nuptial agreement to share the property with the heirs. The Oregon Supreme Court held that a court of equity had no jurisdiction over the subject matter of this action because it involved matters that fell within the exclusive jurisdiction of the probate court.

In *Cass v. Harder* 153 Ore. 637, 58 P. (2d) 618 (1936), devisees brought a suit in a court of general jurisdiction seeking among other things to charge an executor with interest for his alleged negligent delay in the settlement of the estate. The Court dismissed the suit pointing out that all matters sought to be litigated could have been, and many of them were, presented in the probate court.

National Surety Corp. v. McArthur 174 Ore. 376, 149 P. (2d) 328 (1944), was an action in a court of general jurisdiction against a former administrator brought by his surety to recover losses sustained by the estate through the alleged negligence of the defendant in his administration. The court held that the remedy could be pursued "only in the probate court". (174 Ore. at 380, 149 P. (2d) at 329).

Matters pertaining to probate and the administration of estates are matters of local competence, and for this reason it has become firmly established that the fed-

eral courts have no jurisdiction over matters which are probate or administrative in nature. The exclusive jurisdiction of the states is protected by the Tenth Amendment to the United States Constitution. Federal courts do not interfere in probate and administrative matters for the same general reasons that federal courts do not interfere in other local matters, such as divorce, filiation proceedings, care of the insane and mandamus of state officers.

Woerner in his *American Law of Administration*, Vol. I, Sec. 156a, p. 542, states as follows:

“But there is no federal law of probate or of the administration of estates, * * *. And, as established by the Supreme Court of the United States in an exhaustive opinion delivered by Justice Brewer, the Federal Courts have no original jurisdiction with respect to the administration of estates of deceased persons; they cannot draw unto themselves by reason of any of the powers enumerated, the res or administration itself; nor make any decree looking to the mere administration of the estate. * * * These courts properly recognize the importance of fully according to the convenient forum of the State Probate Courts, jurisdiction over purely probate administrative proceedings, where for more than a century such jurisdiction has been understood to belong. The rights of the parties as given or restricted by the probate jurisdiction of the State Courts are fully recognized.”

In *Tussing v. Central Trust Company* (DC ED Mich. SD), 34 F. (2d) 312 (1929), the Court said at 34 F. (2d) 315:

“It is a settled rule of law in the federal court that, when a probate court of a state, in the exercise of its exclusive jurisdiction which it has acquired over

assets of an estate, is engaged in the administration of such assets and legal proceedings pending before it, a federal court will not disturb or interfere with the administration of such estate or the control of such assets by such probate court or by its officers acting in their official capacity.”

The following statement is made in Anno. 158 A.L.R.

14:

“Generally speaking, it is well settled that even though there exists the requisite diversity of citizenship and amount in controversy, a Federal court has no jurisdiction, either original or upon removal of a cause from a state court, of matters strictly or purely probate or administrative in nature; and this is so not primarily because the court whose aid is invoked is a national court, but because such matters, being statutory, and involving proceedings in rem, do not belong to the general equity jurisdiction under long-established chancery practice.”

There have been many cases in which it has been held that a federal court lacked jurisdiction to determine a question closely connected with the administration of an estate.

Putnam v. Citizens' National Trust & Savings Bank (CCA 9), 77 F. (2d) 58 (1935), was a suit brought against the executor by a daughter of the decedent. Plaintiff sought among other things to require the executor to pay damages to the estate based upon the fact that the executor had paid a widow's allowance for an unreasonable length of time and had otherwise negligently administered the estate. The Circuit Court of Appeals affirmed a decree of dismissal on the basis of lack of jurisdiction.

Another case in which a plaintiff unsuccessfully attempted to secure an adjudication from a federal court concerning a widow's allowance was *Central National Bank v. Fitzgerald* (CC D Neb.), 94 Fed. 16 (1899). In this case a creditor of the estate brought suit in a federal court of general jurisdiction, alleging, among other things, that the family allowances awarded by the probate court were too large. In ruling on a demurrer to the complaint the court made the following statements concerning the family allowances at 94 Fed. 18:

“It is open to complainant and the other creditors to contest these allowances in the probate court, and, if aggrieved by its judgment, a remedy is open by appeal to the Supreme Court of Nebraska. With respect to allowances of this character, in the absence of proof showing that the probate court was fraudulently imposed upon, or the creditors were fraudulently prevented from contesting the same in the probate court, a court of equity will not attempt to reexamine the allowances made by the probate court.”

Carstensen v. United States Fidelity & Guaranty Co. (CCA 9), 27 F. (2d) 11 (1928), was an action brought by a creditor of the estate in a court of general jurisdiction against the executor's bondsman. Plaintiff alleged that his claim against the estate was unpaid, that all other claims of the same class had been paid, that the estate was being consumed by taxes, allowances and fees and was liable to become insolvent through maladministration, and that the executor had failed to file his report. Plaintiff sought to recover the amount of his claim plus interest. The lower court dismissed the complaint for lack of jurisdiction over the subject matter and the

judgment of the lower court was affirmed on appeal. At page 12 this court made the following statement:

“Matters of strict probate are not within the jurisdiction of the federal courts.”

In *Sutton v. English* 246 U.S. 199, 38 S. Ct. 254, 62 L. Ed. 664 (1918), the heirs of a decedent brought suit in a federal court of general jurisdiction. Plaintiffs sought to have the decedent's real property partitioned among themselves on the ground that decedent's Will, which disinherited them, was invalid because of undue influence and incompetence. The Supreme Court considered the case solely on the jurisdictional issue, and held that since the annulment of the Will was essential to plaintiff's right to any relief, and since the federal court had no jurisdiction to annul the Will, the court had no jurisdiction over the subject matter of this suit. At 246 U.S. 205, 38 S. Ct. 256, 62 L. Ed. 668, the Court made the following statement:

“By a series of decisions in this Court it has been established that since it does not pertain to the general jurisdiction of a court of equity to set aside a will or the probate thereof, or to administer upon the estates of decedents in rem, matters of this character are not within the ordinary equity jurisdiction of the Federal courts; that as the authority to make wills is derived from the states, and the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of the courts of the United States.”

Davis v. Davis (CC D Mont.), 89 Fed. 532 (1898), was likewise a case in a federal court of general jurisdiction. Plaintiff had contracted with his brother that

plaintiff, in return for the performance of certain services, would receive one-half of the brother's share of the father's estate. The father's will was admitted to probate and the probate court's order admitting the will indicated that distribution would not be made in accordance with the plaintiff's contract. Plaintiff alleged that the total claims against his father's estate were less than \$50,000, and he sought a decree providing among other things that he was entitled to one-half of his brother's legacy, and directing the administrator to account and to retain his commissions plus \$50,000 to pay claims and distribute the remainder of the estate. The court held that plaintiff had stated a good cause of action in equity in the nature of a suit for specific performance of a contract, and held that plaintiff was entitled to relief of some sort on the contract, but at p. 539 the court made the following statement:

"The prayer is too broad and asks for relief which this Court has no jurisdiction to give. To ascertain the amount of unpaid claims against the estate of a deceased person, and to determine when such an estate is in a condition for distribution, are matters within the jurisdiction of the courts of the state exercising probate jurisdiction, and concerning which this court has no authority to interfere."

Johnson v. Ford (CC D Ore.), 109 Fed. 501 (1901), was a suit brought against the executor of an Oregon estate, and others. Plaintiff alleged that the other defendants, in collusion with the defendant-executor, converted property of the estate, that the executor filed a false inventory with the Probate Court, and that the executor refuses to take any steps to recover the prop-

erty of the estate from the other defendants. Defendant-executor demurred on the basis of lack of jurisdiction, and the Court sustained the demurrer. The Court held that an Oregon Probate Court has exclusive jurisdiction to administer decedent's estates, "and to determine all questions necessary to such administration". (p. 502). Also at p. 502 the Court stated:

"If there is property belonging to the estate that the executor has not included in his inventory; if the executor is remiss in his duty, or is guilty of fraudulent practices affecting the estate,—these are matters exclusively within the cognizance of the court of probate, whose jurisdiction is adequate to grant relief by the summary process of removal."

Nelson v. Miller (CA 9), 201 F. (2d) 277 (1952), was a case in which a decedent owned property in California and Florida, and probate proceedings were initiated in each state, based on the theory that the decedent was a domiciliary of that particular state when he died. This was an action brought by the Florida executor against the California executor to obtain a determination that the decedent was domiciled in Florida and to obtain the property administered by the California executor. This court held that the probate court of each state had the authority to administer the assets in that state and to make its own finding concerning the domicile of the decedent, and the federal court had no jurisdiction either to determine the domicile or to disturb the possession of the decedent's property.

Reynolds v. Remick (DC D Mass.), 82 F. Supp. 281 (1949), was a suit by the beneficiary of a testamentary trust against one of the trustees. Under the law of Mass-

achusetts a trustee of a testamentary trust is supervised by and must account to the Probate Court. Plaintiff alleged that defendant wastefully expended trust money for his own personal benefit and prayed that the defendant account for his personal profits derived from his breach of trust, and for other relief. The complaint was dismissed for lack of jurisdiction, and at page 283 of 82 F. Supp. the court made the following statement, referring to the issue raised by plaintiff's allegations of improper administration:

"It turns on subtle problems of fiduciary discretion and administration which are even now about to be considered by the state court which gave its sanction to the appointment of the trustee and which is established for the very purpose of holding to strict account those who operate a res within the exclusive control of that court."

At p. 282 the Court made the following statement:

"The complaint must be dismissed because it presents charges relating exclusively to that type of administration of and accounting in a probate estate with which federal courts do not intermeddle."

Foster v. Carlin (CA 4), 200 F. (2d) 943 (1952), was an action brought for a determination that an alleged trust was fraudulent in its inception and void, that a settlement agreement was vitiated by fraud, that the deceased died intestate as the owner of shares of stock of a corporation, and for the appointment of a receiver for the corporation. The Court of Appeals held that the District Court had jurisdiction over all matters involved except a determination as to whether the deceased died intestate.

In *Rice v. Sayers* (CA 10), 198 F. (2d) 724 (1952), cert. den. 73 S. Ct. 172, 344 U.S. 877, 97 L. Ed. 680, decedent left his entire estate in testamentary trusts for several educational institutions. This was a suit by his heirs in federal court to have the trusts declared void. The estate was probated in the State of Kansas. Under Kansas law the probate court had exclusive jurisdiction over a suit to contest a will. The court held that in effect this was a suit to contest a will and the district court had no jurisdiction over the subject matter.

Kittredge v. Stevens (CCA 1), 126 F. (2d) 263, cert. den. 317 U.S. 642, 63 S. Ct. 34, 87 L. Ed. 517 (1942), was an action against an administrator, a trustee and a guardian, and the Court of Appeals construed the complaint as requesting the court (1) to hold the defendants personally liable to the plaintiff because they withheld property rightfully belonging to the plaintiff, and to her predecessor; (2) to order the defendants to turn over to the plaintiff property which they received in their fiduciary capacities; and (3) to order an accounting with respect to both aspects of the relief requested.

The court stated at p. 267:

“If the issues presented by the complainant involve a consideration of the actual handling of the trust property by the fiduciaries, then the federal courts would appear to have no jurisdiction.”

The court then held that such issues were presented by this case, and therefore there was no jurisdiction.

Princess Lida v. Thompson, 305 U.S. 456, 59 S. Ct. 275, 83 L. Ed. 285 (1938), arose in Pennsylvania, and

under Pennsylvania law after a trustee filed an accounting with the Common Pleas Court the court acquired jurisdiction over the trustee somewhat similar to the relationship of a probate court and an executor, in that the court had supervisory control over the administration of the estate, and had power to hear objections to the account and to surcharge the trustee. The Supreme Court held that the Federal District Court had no jurisdiction over the matter pending therein because the contentions of the plaintiff were solely as to the administration and restoration of the corpus of the trust, and the Pennsylvania state court had exclusive jurisdiction over those matters.

In *Feist v. Fidelity Union Trust Company* (DC D N.J.), 29 F. Supp. 51 (1939), plaintiff and defendant were co-executors and co-trustees under the will of the plaintiff's deceased husband. The will had been admitted to probate and an account had been filed in the probate court of New Jersey. The complaint alleged improper and unlawful administration of the estate by the defendant trust company resulting in enormous losses, and sought to surcharge the defendant and remove it as executor and trustee. The court dismissed the complaint for lack of jurisdiction.

Numerous other cases could be cited for the proposition that federal courts have no jurisdiction over matters strictly and purely probate or administrative in nature.

Anno. 158 A.L.R. 12.

54 Am. Jur. U.S. Court, Sec. 36.

There are no real exceptions to this rule.

Appellant quotes from the foregoing A.L.R. annotation but fails to point to any authorities or language appearing in it supporting the view that all material portions of its case are in the exclusive jurisdiction of the Oregon probate court, and fails to make an accurate analysis of the decisions appearing in it.

As appears from the A.L.R. annotation, federal courts do have the right to adjudicate the amount of a creditor's claim, the status of one claiming to be a distributee, and whether a probate order or decree may be set aside for extrinsic fraud in the probate proceedings.

Gillespie v. Schram (CCA 6), 108 F. (2d) 39 (1939).

Blacker v. Thatcher (CCA 9), 145 F. (2d) 255 (1944).

Smith v. Worthington (CCA 8), 53 Fed. 977 (1893).

However, none of these instances involves a decision as to the establishment or control of the duties of an executor by the local Probate Court which appoints him and of which he is an officer. The three categories above mentioned do not directly deal with an executor's duties as such. In the case of a creditor or a distributee whose status may be established by decree of a federal court, the federal court does not enter the administrative field occupied by the local probate court and determine how or when such claims shall be paid. It does not decide how the funds shall be raised, what assets shall be sold, the priority of various claims, or the *time* and *manner* of payment. These matters all involve too direct an in-

terference in a purely local administrative field. In granting relief from a probate order procured by extrinsic fraud, the federal court does not concern itself with whether the plaintiff could or should have had a different probate order, but only whether some fraud was practiced upon the Probate Court itself.

Of course, if a state gives a remedy, not theretofore existing, by civil action in its courts of general jurisdiction, such remedy may also be had in the federal court sitting in that state. In accordance with this rule, a federal court, which would otherwise have no jurisdiction over a suit affecting probate or other matters of administration, has jurisdiction when by the law of the state where the federal court is sitting a court of general jurisdiction has jurisdiction of an independent suit inter partes involving a like subject matter. Anno. 158 A.L.R. 17.

The *only* federal case cited by the plaintiff in which the court reviewed the manner in which an estate was administered in order to determine whether it was administered negligently, as plaintiff urges the District Court to do in this case, was a case falling squarely under this rule: *Ross v. Beacham* (DC WD S.C.), 33 F. Supp. 3 (1940).

In that case plaintiff alleged negligent administration of the estate including a 10 year failure to file an annual account. The defendant-administrator did not raise the jurisdictional issue but denied the allegations of negligence and pleaded a judgment in bar. His reason for failing to raise the jurisdictional issue becomes obvious

at p. 8 of 33 F. Supp., where Section 9012, South Carolina Code 1932, is quoted in part. That statute required an administrator to file an annual account and provided that if he failed to do so he would "be liable to be sued for damages by any person or persons interested in the estate". No such provision can be found in the Oregon law.

A further investigation of the law of South Carolina reveals another basic difference between the law of that state and the law of Oregon. In South Carolina the Probate Court does *not* have exclusive jurisdiction over probate matters; rather the Court of Common Pleas, a court of general jurisdiction, (South Caro. Const. '95, Art. V, Sec. 15) has concurrent jurisdiction with the Probate Courts. *Beatty v. National Surety Co.* 132 S.C. 45, 128 S.E. 40, 43 (1928).

Since in Oregon the Probate Courts have *exclusive* jurisdiction over probate matters, and Oregon state courts of general jurisdiction do *not* have jurisdiction over matters strictly probate or administrative in nature, the *Ross* case is distinguishable and does not support plaintiff's contention

In the instant case, the plaintiff, as a foundation of her case, asked the District Court to determine that widow's support money, undetermined in amount, should have been paid at some date and in some amount never passed on by the Probate Court, out of funds or assets subject to the control of the local court. It is an attempt to have a federal court assume probate jurisdiction, to determine *ex post facto* what the proper action for the

executor was, when the executor himself was directly responsible to the Probate Court.

Bancroft's Probate Practice (2d Edition) Sec. 337 contains the following statement:

"The probate court or judge is the actual guardian of the estate, and all proceedings are under its direction, it being the duty of the executor or administrator to take possession of the property of the estate and preserve it for the benefit of the heirs and creditors; but the executor or administrator possesses and handles the property subject to the control of the probate court. Consequently, the probate court is vested with the power to supervise the conduct of the executors or administrators; and if they neglect to procure authorization to perform acts, that court is the tribunal to approve or disapprove."

The Oregon Supreme Court stated in *Re Workman's Estate*, 156 Ore. 333, 390, 68 P. (2d) 479, 481 (1937):

"From in re Wilson's Estate, 85 Ore. 604 (167 P. 580), we quote:

"'In the administration of an estate, of which the County Court has exclusive jurisdiction in the first instance, it is necessary for that court to direct the executors how to proceed, to whom the property in their hands shall be given, and what each shall receive. It has full power and jurisdiction to respond to such petition by an appropriate decree. That is one of its functions and duties.'

"The following is taken from Bancroft's Practice, Sec. 336:

"'An administrator, duly appointed, is thus an officer of the court, subject to its orders, answerable to the court in contempt proceedings or liable to removal from office for refusal to obey the order of the court, and is entitled to the protection of the

court in carrying out its orders. Except under the nonintervention will statutes existing in a few states, the policy of the law is that the court have supervisory control of all the acts and transactions of either an executor or an administrator. Indeed probate courts are vested with very extensive discretionary power over the conduct of these officers, and exercise of such discretion will not be interfered with on appeal unless plainly required by some principle of law. An executor or administrator thus holds the estate substantially as a stakeholder, for delivery in accordance with the court's order of distribution. The probate court or judge is the actual guardian of the estate, and all proceedings are under its direction. The executor or administrator derives his power from the order of the court issuing his letters, and acts simply under its control.'

"From the above it will be observed that the representative is at all times subject to the superintending power of the probate judge."

The principle set forth in *Re Workman's Estate* 156 Ore. 333, 65 P. (2d) 1395, 68 P. (2d) 479 (1937), and by Bancroft as quoted above was applied by the United States District Court for the District of Oregon in the case of *Crocker v. Kay* (DC D Ore.), 2 F. Supp. 162 (1932); affirmed 62 F. (2d) 391; cert. den. 288 U.S. 615, 53 S. Ct. 506, 77 L. Ed. 988. In that case an order of the Referee in Bankruptcy directing an administratrix to pay over certain moneys to the Trustee was vacated on the basis of lack of jurisdiction.

On p. 164 the Court made the following statement:

"A person is not entitled to become administratrix as of right, but only subject to the order of a Court. By appointment the administratrix becomes the arm of the court. Her possession is the possession of the

court, for she acts under its authority and is guided by its orders. In every sense the administratrix is the officer of a court. See *Byers v. McAuley*, 149 U.S. 608, 13 S. Ct. 906, 37 L. Ed. 867.

“It would indeed be the height of injustice, therefore, to attempt to punish personally, by contempt, an administratrix, for failure to turn over to the trustee money to which the latter believes he is entitled. This officer cannot act without the authority of the county judge. It would be more to the point to treat the latter as the culprit.”

The language quoted above has particular application to the case at bar. Here the defendant paid the plaintiff her widow's allowance strictly in accordance with the orders of the Probate Court (R. 19). If plaintiff was wronged because the allowance was not paid in a larger amount or at an earlier date, then the wrong was not done by the defendant but by the Probate Court, and no one would seriously contend that a United State District Court has jurisdiction to judge the propriety of the conduct of an Oregon Probate Court in the administration of a decedent's estate. It would be the “height of injustice” to punish personally, by damages, an executor, for failure to turn money over to the plaintiff, since that officer cannot act without the authority of the Probate Judge.

The trial judge, in referring to *Crocker v. Kay*, stated:

“In effect, what is charged here is that the court (meaning the Oregon probate court) did not take appropriate action by direction to its officer.” (R. 31).

Later on he observed that “interference by the federal courts * * * would be intolerable” (R. 34). Yet appellant ignores completely the controlling point that the executor

is but an arm of the court and cannot be made accountable to two masters.

Insofar as the jurisdictional question is concerned, a similar situation exists when a state creates an administrative tribunal and gives such tribunal exclusive jurisdiction over certain matters. The Workmen's Compensation Law of Kansas required the Commissioner of Workmen's Compensation to hear all claims for Workmen's Compensation. In *Employers' Liability Assurance Corp. v. Matlock*, 151 Kans. 293, 98 P. (2d) 456 (1940), an insurance company, in order to avoid liability on a compensation claim filed with the Commissioner, brought suit in a court of general jurisdiction to cancel its insurance policy on the ground of fraud or in the alternative to reform the policy because of mutual mistake. The Kansas Supreme Court held that the trial court had no jurisdiction of the subject matter of the action because *all* issues pertaining to the liability of an employer or an insurer for compensation must be determined by the Commissioner of Workmen's Compensation in accordance with the statutory procedure.

In *McGuire v. U. S. Fidelity and Guaranty Company*, 134 Kans. 779, 8 P. (2d) 389 (1932), an injured workman brought an action against his employer's insurer in a court of general jurisdiction to recover compensation under the provisions of an insurance policy. The Kansas Supreme Court held that the trial court was without jurisdiction to entertain such an action because the injury and the relationship of the parties brought the matter within the scope of The Workmen's Com-

pensation Act and made necessary a determination of the matter by the Commissioner.

As we noted earlier, plaintiff's brief is devoted primarily to the contention that the facts she has alleged constitute a cause of action. Plaintiff advocates a novel theory to the effect that a corporate fiduciary should be held to a higher standard than other fiduciaries in the administration of an estate, plaintiff apparently conceding that by normal standards the administration of the Mc-Can Estate was proper. Plaintiff also indicates (Appellant's Brief, p. 11) that she is unable to offer direct authority for her contention that her Complaint states a cause of action, but can only offer by analogy authority dealing with such unconnected matters as charitable institutions and trusts. These authorities do not bear on the jurisdictional question, and for that reason we will touch on them only briefly.

It is difficult to understand the relevance of plaintiff's reference at p. 14 of her Brief to the recent Oregon Supreme Court decision, *Landgraver v. Emanuel Lutheran Charity Board*, 60 Ore. Adv. Sh. 141, 280 P. (2d) 301 (1955), which refused to overturn the principle that charitable institutions are immune from tort liability. While plaintiff obviously prefers the views of the dissenting justices, this has no bearing on whether or not the federal court has jurisdiction of the subject matter upon which plaintiff's alleged cause of action rests.

Plaintiff also makes the point that an executor is considered a "trustee" for the creditors and beneficiaries of the estate. While this true in a general way, it must

be remembered that there is an important distinction between an executor and a trustee insofar as the jurisdictional question is concerned. Decedent's estates in Oregon are supervised *exclusively* by Probate Courts, as we have shown earlier in this brief, whereas in Oregon trusts, including testamentary trusts, are not supervised by Probate Courts but come under the jurisdiction of courts of general jurisdiction. *In re Roach's Estate*, 50 Ore. 179, 92 Pac. 118 (1907). Thus, in a proper case, a court of general jurisdiction may review the conduct of a trustee to determine whether he has violated his duties, but only the Probate Court can make such a determination concerning an executor.

But even if we consider the nature of an executor's duties to determine the point, wholly irrelevant to the jurisdictional question, as to whether a cause of action is stated, it becomes obvious that no duty has been violated. Under the authorities cited both in this brief and by the trial judge, the executor's duty is to protect and preserve the estate, and pay and distribute it only when ordered so to do by the Probate Court.

Plaintiff discusses and quotes at length from a law review article, "Tort Liability for Interference with Testamentary Expectancies in Decedent's Estates," *University of Kansas City Law Review*, Vol. 19, p. 78 (1951) (Appellant's Brief, p. 16). Although it might appear from the title that the article is in point, the article does not support plaintiff's contentions either on the cause of action question or the jurisdictional question. The article deals only with wrongfully inducing the execution

or revocation of a Will, wrongfully preventing execution or revocation of a Will and wrongfully suppressing or destroying a Will. The author of the article urges tort liability in those cases by reasoning that a person who “*willfully* causes damage to another” (Appellant’s Brief, p 17) should compensate the wronged party, which reasoning has no application whatsoever to an action such as this based on negligence. In any event, the article does not even suggest that an executor is liable in tort for improper administration, nor does it bear upon the jurisdictional question.

In contending that the complaint states a cause of action, plaintiff also cites several cases from other jurisdictions which we have not discussed elsewhere in this brief, that might appear at first glance to support plaintiff on the jurisdictional question, and we will therefore briefly discuss these cases.

Moyers v. Carter, Ct. of Civ. App. of Tex., 61 S.W. (2d) 1027 (1933), cited by plaintiff on p. 21 and p. 23 of her brief, was a proceeding in the Texas District Court, a court having probate jurisdiction. See Texas Constitution, Art. V, Sec. 8, set forth at 61 S.W. (2d) 1031. Also, plaintiff merely recovered her allowance, not damages for delay in payment of the allowance.

Compher v. Compher, 25 Pa. 31 (1855), cited by plaintiff on pp. 21 and 23 of her brief, considered a probate statute giving to the widow, on her application, support money in the specified sum of \$300. This was merely a suit by the widow to obtain her \$300 support money. The case is not in point because the statute pro-

vided for an automatic, liquidated allowance, payable immediately and without restriction, from the assets of the estate. There was no reason or occasion for the probate court to enter an order fixing either the *time* or *amount* of the payment.

In re Murray's Estate, 158 Pa. Supp. 504, 45 A. (2d) 411, and in *Re Faelchle's Estate* (Ohio), 89 N.E. (2d) 96 (1942), both cited on p. 21 of plaintiff's brief, also considered statutes specifying in dollars and cents the total amount of the allowance.

Both the *Faelchle's Estate* case and *Sawyer v. Heirs of Sawyer*, 28 Vt. 245 (1856), cited on p. 21 of plaintiff's brief, were cases arising in the probate courts in which the widow was attempting to claim her allowance from the estate, and the question before the court was whether the court should grant the allowance.

American-Jewish Joint Distribution Committee v. Eisenberg, 194 Md. 193, 70 A. (2d) 44 (1949), cited by plaintiff on p. 23 of her brief, was a suit initiated by the executor for instructions in the administration of the estate. *Shupe v. Jenks*, 195 Wis. 334, 218 N.W. 375 (1928), also cited by plaintiff on p. 23 of her brief, was an action brought against the executor with the consent of the county judge, and the county judge was a party plaintiff. The proper probate procedure was followed in both cases and the jurisdictional issue was neither raised nor commented on by the court.

Plaintiff makes the point on p. 7 of her brief that a state cannot adopt procedures that limit a constitutional right to litigate a particular matter in the federal courts.

This point is immaterial since there is no constitutional right to obtain a federal court determination as to whether particular conduct of an executor does or does not constitute a proper administration of a decedent's estate. To the contrary, by the Federal Constitution (Amendment X), exclusive jurisdiction is reserved to the state.

Only a court with probate jurisdiction can determine a question intimately connected with the administration of an estate, and neither the United States District Court nor the general courts of Oregon have probate jurisdiction.

This case raises issues that are so closely connected with the administration of the estate of C. P. McCan that these issues can be determined only by the Probate Court of Multnomah County and by no other court.

The complaint itself concedes that plaintiff seeks recovery exclusively for alleged violations of duties of an executor. Plaintiff alleged in paragraph VIII of her complaint (R. 7) "defendant was negligent in the performance of its duties on behalf of the estate of Charles P. McCan * * *". Plaintiff alleged in paragraph XII of her complaint (R. 10): "During the period of more than six months from the 9th day of January, 1952, to and including the 18th day of July, 1952, defendant failed to exercise diligence and was negligent in the performance of the duties required of it by law assumed by it as executor of the Will of Charles P. McCan." Plaintiff also alleged in paragraph XIV of her complaint (R. 12): "As a result of the negligence of defendant in the perform-

ance of the duties assumed by it in the administration of the estate of Charles P. McCan, Deceased, * * *". Plaintiff also admits in her brief that her action is "based upon the negligence of the Bank in administering the estate". (Appellant's Brief, p. 2).

What the plaintiff seeks to accomplish is to substitute the judgment of a federal court jury for the judgment of the Multnomah County Probate Judge as to whether defendant did or did not administer the McCan estate in the proper manner.

The specific conduct of which plaintiff complains is conduct peculiarly woven into the administration of the estate. Only the Probate Court of Multnomah County can determine:

(1) Whether defendant owed plaintiff a duty to file an Inventory and Appraisal, and when the Inventory and Appraisal should have been filed;

(2) Whether defendant owed plaintiff a duty to give information concerning the estate, what information should have been given, when, to whom and in what manner it should have been given;

(3) Whether defendant owed to plaintiff a duty to pay a widow's allowance, when and in what amount the allowance should have been paid.

Specific provisions of the Oregon Probate Code deal with each of these matters, thereby demonstrating the obvious fact that these matters fall within probate jurisdiction. It is also important to note that none of the facts alleged amount to a violation of the specific provisions of any statute.

The time and manner of filing the inventory are regulated by OCLA 19-401 (ORS 116.405), which gives the probate judge express power to extend or fix the time for filing (See appendix). Who but the probate judge could determine when the inventory shall be filed? Can a federal court be permitted to fix a date different from that determined by the court of which the executor is an officer?

The method of "giving information" by executors as to the affairs of an estate is equally governed exclusively by the probate court. The statutory methods for affording information to interested persons are the previously mentioned procedure for filing the inventory and the further statutory provisions for the filing of periodic accounts, OCLA 19-1001 and 19-1002 (ORS 117.010 and 117.020) (See appendix). Under the latter section, if the executor fails to file an account within the time provided, he may be cited by the probate court and punished for contempt.

As to the widow's allowance before and after the filing of the inventory, this is governed respectively by OCLA 19-601 and 19-603 (ORS 116.005 and 116.015). Under each statute the *time* and *amount* of each payment is to be fixed by the *Probate Court*.

"OCLA 19-601. Possession of homestead, wearing apparel and furniture before inventory: Provision for widow and children during such period. Until administration of the estate has been granted and the inventory filed, the widow and minor children or husband and minor children of the deceased, as the case may be, are entitled to remain in the possession of the homestead, all the wearing apparel of the

family and household furniture of the deceased, and also the widow and minor children shall have a reasonable provision for their support during such period, to be allowed by the court."

"*OCLA 19-603. Further order for support: When made.* If the property so exempt is insufficient for the support of the widow and minor children, according to their circumstances and condition in life, for one year after the filing of the inventory, the court or judge thereof may order that the executor or administrator pay to such widow, if any, and if not, then to the guardian of such minor children, an amount sufficient for that purpose; but such order shall not be made unless it appear probable that the estate is sufficient to satisfy all the debts and liabilities of the deceased, and pay the expenses of administration in addition to the payment of such amount."

Likewise, *OCLA 17-118 (ORS 113.070)* merely states that a widow "shall have her reasonable sustenance out of the estate for one year". It does not specify either the *time* or *amount* of payment, leaving such matters to the discretion of the Probate Court.

It is clear that these statutes which are at the heart of plaintiff's case require a determination by the probate court as to time, availability of assets, and amount of payment *before* any duty is imposed on the executor to make payment.

Under normal practices neither a distributee nor a widow has any claim to funds in the possession of an executor unless and until the right to them is established by order of the probate court. In *Cass v. Harder*, 153 Ore. 637, 58 P. (2d) 618 (1936), cited previously, a distributee of an estate was held to have no claim in a court

of general jurisdiction against an executor for delay in distribution where no decree of distribution had been entered by the probate court.

In *Hurley v. Hirsch*, Ct. of Civ. App. of Tex., 66 S.W. (2d) 387 (1933), the widow of the deceased, as administratrix, had obtained a decree of distribution directing the distribution of the entire estate to her. By proper procedure, Hirsch petitioned for a writ of certiorari, and established that she was an illegitimate daughter of a deceased daughter of the deceased and entitled to share in the distribution of his estate. The Appellate Court reformed the judgment of the lower court on this basis.

On a motion for a rehearing, Hirsch contended that she was entitled to interest on her share of the estate. The Court stated at 66 S.W. (2d) 393:

“An administrator is not required and legally cannot distribute or pay out funds in his custody, except on proper order of the probate court, and it cannot be said that it is a breach of duty for an administrator to refuse distribution, or refuse to pay a claim without the proper order from the court, or for paying out the funds when ordered by the court so to do.”

The Court then held that since the administratrix had distributed the entire estate to herself under an order of the probate court, there could be no liability to Hirsch until the order was annulled and vacated and a new order entered, and then only if the administratrix declined to distribute as ordered.

If a distributee has no claim against an executor for

failure to distribute before a court order, a widow, similarly, should have no such claim.

If an executor pays a widow's allowance without a probate court order, he assumes the risk of a surcharge in the event that the probate court does not later authorize his payment.

U. S. Fidelity & Guaranty Co. v. Greer, 29 Ariz. 203, 240 Pac. 343 (1925).

In re Lux's Estate, 100 Calif. 606, 609, 35 Pac. 345, 639 (1894).

In both of the above cited cases, the executor was surcharged because he paid a widow's allowance which was not authorized by an order of the probate court. In *U. S. Fidelity & Guaranty Co. v. Greer*, the Court said at 240 Pac. 347, "Every dollar paid the widow without authority from the probate court was illegally paid, and stood as a charge against the administrator."

Howard v. Davis, 192 Ga. 613, 15 S.E. (2d) 865 (1941), was a suit by a widow and minor children attempting to set aside a decree of a probate court discharging the administrator, in which the plaintiffs prayed for a judgment against the administrator and his surety. The entire estate had been consumed in the payment of debts, and under Georgia law, the payment of a widow's allowance had priority over these debts. The widow had not previously applied for an allowance, and the probate court had not entered an order granting the allowance. The widow alleged that if she had known of the appointment of the administrator, she would have applied for her allowance. In affirming a judgment sus-

taining a demurrer to the widow's petition, the court made the following statement at 15 S.E. (2d) 866:

"Although a judgment for a year's support would have ranked ahead of the debts, the mere fact that these plaintiffs by relationship occupied a position which would entitle them to apply for and obtain such a judgment, would not entitle them, without having it allowed in the only way provided by law, to have a recovery against the administrator and his surety, A year's support to be enforceable must be manifest in a judgment. It is not in existence as such until such judgment."

See also *Winkle v. Winkle*, 8 Ore. 194 (1879), cited previously, where the Oregon court, in refusing to take jurisdiction of a suit to establish a trust in property which the probate court had set aside to the widow as exempt property, stated at 8 Ore. 196:

"The title to the personal property of a deceased person must be derived from the administrator through the orders of the court, and the orders of said court, and the distribution made under them of personal property, are binding on all persons who are interested in the estate, provided such orders are regular and in due form of law. * * * For the statute has conferred on the county court exclusive jurisdiction in all matters pertaining to the transfer of the title to personal property of deceased persons. A court of equity has no jurisdiction over it."

It is difficult to conceive of a situation more closely and intimately connected with the probate of an estate than the determination by a court of time of payment and amount of a widow's allowance.

If appellant is correct, it is easily possible that a probate court and a federal court could arrive at completely

different conclusions as to whether a duty to act exists and as to the time and manner of its performance. Appellant has no answer for this argument for the obvious reason that none exists. As the trial judge clearly stated: "If it be assumed there was a duty to the widow to obtain an allowance for her, the administrator would be under a tremendous burden if the probate court refused to grant the order. Clearly, this shows that the coercion would be brought on the probate court and interference with administration would be patent." (R. 33).

Appellant criticizes the above procedures stressed by the trial court for controlling the actions of an executor, as "wholly inadequate and meaningless." Assuming, arguing, that they are, the federal courts have no power to act unless and until the state, by legislative act, surrenders the exclusive control of its probate courts over executors to courts of general jurisdiction. Moreover, as has been pointed out, appellant both by these statutory remedies, and by others had adequate opportunity for relief within the framework of the present probate code.

If jurisdiction existed in any court except the Probate Court to determine the nature and extent of the duties here involved, no executor or administrator could safely follow the orders of the court appointing him, of which he is an officer, and to which he is directly responsible. Under plaintiff's reasoning, although the Multnomah County Probate Court has exclusive jurisdiction over the administration of the McCan Estate, an independent state or federal court has jurisdiction to arrive

at a different determination concerning the duties of the executor, such as the amount and time of payment of a widow's allowance, time of filing an Inventory and Appraisal, and the furnishing of information to persons interested in the estate. If this Court sustains plaintiff's contention, not only is the exclusive jurisdiction of the Oregon Probate Courts at an end, but the orderly administration of a decedent's estate in Oregon will be impossible, because an executor will no longer be protected by acting in conformance with the orders of probate courts.

Here, the Probate Court ordered the defendant, as executor, to pay specific amounts to plaintiff at specific times as a widow's allowance (R. 17, 18), and plaintiff now contends that the District Court has jurisdiction to adjudge that payments should have been made at different times, and presumably in different amounts. On June 23, 1952 the Probate Court granted defendant an extension of time until July 18, 1952 to file an Inventory and Appraisement (R. 17), and plaintiff now contends that the District Court has jurisdiction to adjudge that defendant had a duty to file the Inventory and Appraisement prior to July 18, 1952. Concerning plaintiff's third allegation of negligence, defendant's failure to furnish information of some sort to complainant and others, there was no Probate Court order only because neither the plaintiff nor anyone else brought the matter before the Court by timely petition for a decision.

Let us assume for the moment that plaintiff's contention of jurisdiction is correct, and let us assume further

that an executor is improperly administering an estate, as for example by failing to file his Inventory and Appraisement. Will some interested party bring this failure to the attention of the Probate Court so that the Court can perform its duty and see that corrective action is taken, in accordance with the Probate Code? Certainly not, for potential rewards are much greater if the interested party bides his time, ignores his remedies in the Probate Court, and later brings an action for substantial damages in a court of general jurisdiction, as plaintiff has done here. Such a situation would defeat the obvious purpose of the Oregon Probate Code, which is to promote the proper and orderly administration of decedent's estates *by the Probate Courts*.

Appellant repeatedly argues that a probate court cannot try an action for damages based on negligence. The argument is not an accurate one. Where the executor's breach of duty consists of the negligent administration of an estate and results in damage to the estate, the personal representative may be surcharged in the probate hearings on his accountings.

Moreover, our position does not deprive plaintiff of a remedy in damages, in some court other than the Probate Court, once the executor's duty has been established by the Probate Court. If the executor had been ordered by the Probate Court to pay a widow's allowance, file an Inventory and Appraisement or do some other specific thing at a particular time, but wrongfully failed so to do, presumably damages necessarily flowing from this failure could be assessed in an independent action. This

would be an orderly procedure and not one involving inconsistent adjudications as to the nature and extent of a probate duty.

If plaintiff had come into the United States District Court and alleged facts showing that the defendant had improperly administered the McCan estate, and *that the Probate Court of Multnomah County had determined that defendant's administration of the estate was improper*, and that such misconduct proximately caused compensable injury to the plaintiff, then the District Court could, conceivably, have had jurisdiction over the subject matter. The Court, without usurping probate jurisdiction, could then proceed and determine whether or not plaintiff's alleged facts constituted a cause of action, and if it decided in the affirmative, it could try the case on the merits.

Also, if an improper delay had been brought to the Probate Court's attention, and the Court, either on petition for removal under OCLA 19-222, (ORS 115.470), or on its own motion under OCLA 19-226, (ORS 115.490), had removed the executor after making a determination of improper delay and the time when the payment should have been made, or the Inventory and Appraisement filed, or other information furnished, plaintiff might have had a cause of action for damages in an independent action. Again, there would be no conflict between the orders of the Probate Court and another court.

Although a remedy may be available in a court of general jurisdiction in the above situation, it should be

pointed out that plaintiff also had a remedy in the Probate Court. Actually, plaintiff's only *real* remedy was in the Probate Court of Multnomah County. If the circumstances were such that defendant ought to have paid a widow's allowance to plaintiff on February 5, 1952, then plaintiff on or about that date should have petitioned the Probate Court for an order directing payment. That Court, and no other, could determine whether estate funds were available and should have been paid to plaintiff at that time, and only that Court could determine the amount and order the defendant, as executor, to make such payment.

If the executor or any other interested party deemed that plaintiff's demands for an allowance were unwarranted or improper, such person could have resisted the petition. The hearing on a petition for a widow's allowance is an adversary proceeding and the order granting or denying the allowance constitutes a final judgment from which an appeal may be taken to the Oregon Supreme Court. *In Re Frizzell's Estate*, 95 Ore. 681, 188 Pac. 707 (1920), and *Aamoth v. Larson*, 197 Ore. 267, 253 P. (2d) 268 (1953). Likewise, on or about the date that plaintiff felt that she was entitled to an immediate filing of the Inventory and Appraisement, and to other information concerning the estate, she could have petitioned the Probate Court for an order directing the executor to perform whatever acts plaintiff desired.

It was thus within plaintiff's power to avoid in its entirety the injury she alleges; she need only have presented timely petitions to the Probate Court of Multnomah County.

Appellant argues that there was some affirmative duty on the executor itself to petition the probate court to fix a widow's allowance and pay it. This is simple "ipse dixit" reasoning, with no statutes or cases of any kind cited in support.

The opinion of the trial judge cites cases which show quite clearly that it is not the executor's duty to make application for the allowance, that the executor, in fact, has a duty to challenge requests for such allowances when adverse to the best interests of the estate, and that these adverse interests can only be resolved in the probate court. *Biersdorf v. Putnam*, 181 Ore. 522, 182 P. (2d) 992 (1947), *In re Shepherd's Estate*, 152 Ore. 15, 41 P. (2d) 444, 49 P. (2d) 448 (1935), *In re Ballard's Estate*, 181 Ore. 7, 179 P. (2d) 732 (1947), *In re Frizzel's Estate*, 95 Ore. 681, 188 Pac. 707 (1920), *Dekum v. Dekum*, 28 Ore. 97, 41 Pac. 159 (1895), and *In re Mead's Estate*, 147 Ore. 400, 34 P. (2d) 346 (1934).

OCLA 19-602 (ORS 116.010) requires that the court shall make an order setting apart for the widow all the property of the estate exempt from execution. This statute has been interpreted to place a duty upon the probate court which, as the trial judge here stated, "does not arise, however, until the surviving or minor children *request* that the homestead * * * be set aside * * *." *Jenning v. Jennings*, 197 Ore. 366, 253 P. (2d) 276." (R. 35).

See also *Iltz v. Krieger*, 104 Ore. 59, 202 Pac. 409, 206 Pac. 550 (1922), in which the court held that a widow's homestead right does not vest in her "in the

absence of an order of the probate court setting the same apart to her.”

There is no reason to suppose that the statutes concerning widow's allowances should be construed differently to require an executor to apply for an allowance.

Appellant asserts that an executor “pays the debts of the decedent without any order of court” and cites “*Stewart's Estate*, 145 Ore. 160,” 28 P. (2d) 642 (1934). Appellant overlooks the fact that the executor does so at his peril and that if he does pay a claim without reliance upon the procedure of rejecting the claim and having it determined by court order after adversary proceedings, he may be surcharged when its validity is challenged in hearing upon his final account. Also, appellant overlooks OCLA 19-1003 (ORS 117.030) which requires the Probate Court to order and direct the payment of claims.

The Oregon supreme court in *Re Mead's Estate*, 145 Ore. 150, at 161, 26 P. (2d) 1103 at 1107 (1933), erroneously cited by appellant as “*In re Stewart's Estate*,” stated:

“Even if the court had, on ex parte application of the administrator, authorized these payments, it still retained jurisdiction to disallow the claims when their validity was later questioned. 24 CJ 379, sections 1058, 1059.”

In re Stewart's Estate, referred to by appellant, whose correct citation is 145 Ore. 460 does *not* impose a duty on an executor to pay claims of creditors without a court order. It recognizes that an administrator may be

entitled to credit in his final account for payments made to distributees, or for expenses, without first obtaining a court order, where the payment made is found by the court to be a proper one. However, as the Oregon court was careful to point out at 145 Ore. 472, 28 P. (2d) 646:

“It is also stated in 24 C.J. 498, section 1339, as follows:

“‘Voluntary payments to distributees without an order or decree of court authorizing the same are made by the representative at his own peril * * *.’”

It is completely foreign to the idea of probate that an executor pay out money of the estate, or distribute its property without an order of court.

Appellant refers to *Re Workman's Estate*, 156 Ore. 333, 65 P. (2d) 1395, 68 P. (2d) 479 (1937), quoted earlier in this brief, as an authority for the proposition that the executor, if in doubt as to its duties, should have consulted the probate judge. While the probate court has supervisory powers over its representative, this jurisdiction is exclusive of that of any other court. As the court there stated at 156 Ore. 390, 68 P. (2d) 481:

“The probate court or judge is the actual guardian of the estate, and all proceedings are under its direction. The executor or administrator derives his power from the order of the court issuing his letters, and acts simply under its control.”

The point which appellant most patently fails to meet is that no court, except the probate court, can determine whether its officer, the executor, has been remiss in his duties. How can any court of general jurisdiction determine what the probate court for Multnomah Coun-

ty would have done had matters of the kind here involved been brought to its attention at some earlier or different time? All we know is that this very court has already determined both the proper time for payment and the amount of the widow's allowance (R. pp. 18, 19), that these orders have become final, and that appellant here asks the federal court to arrive at an entirely different result. The confusion and injustice which would be involved to permit such a result demonstrate clearly that the exclusive jurisdiction to determine these issues vested in the probate court. The fact that the probate court has already determined these issues adversely to appellant serves to illustrate that an executor cannot be responsible to two masters, for the obvious reason that the exclusive jurisdiction of the probate court withdraws the issues here sought to be litigated from all courts of general jurisdiction, whether state or federal.

We do not contend that the United States District Court lacks jurisdiction to try all types of tort actions against executors. Such court has jurisdiction to try any tort action that does not require an initial determination as to the existence and extent of a strictly probate duty of an executor.

An executor is personally liable for certain torts committed against third persons when he is acting as executor, not because he has violated any probate duty as executor, but because he has violated a duty imposed by statute or the common law on *all* persons, whether an executor or not, such as to use due care, or to refrain from trespass or conversion. The duty is not a probate

duty and is not owed to persons who are given by statute an interest in the estate of a deceased person. The interests or rights of the latter, and the correlative duties of an executor to them, are essentially probate in nature and rest entirely, first, on the existence of local statutes providing for the interests of heirs or devisees, or special statutory interests, such as the right of a widow to an allowance, and, second, on the determination by the Probate Court of the existence and extent of such interests after proper probate proceedings. When, on the other hand, an executor is held personally liable in tort to third persons, the liability is not to a probate beneficiary, such as a widow, (except by rare coincidence), and does not pertain to an executor's probate duty to such beneficiary. The executor is personally liable for such torts involving third persons irrespective of whether or not he is an executor and whether or not the claimant is a probate beneficiary. In the one instance the duty stems solely from probate status; in the other, probate status has nothing to do with determining the duty said to be violated and forming the basis for the tort. An analysis of the many cases annotated in 44 A.L.R. 637, dealing with the personal liability of an executor for ordinary torts committed against third persons, bears out our position.

On this basis, the case of *Watkins v. Madison County Trust and Deposit Co.* (CCA 2d), 24 F. (2d) 370 (1928), which plaintiff cites on p. 8 of her brief, is distinguishable. The Court in that case made a statement to the effect that a court of general jurisdiction may entertain an action of trover against an executor, with which state-

ment we are in complete agreement, considered in the light of the facts of that case. The Court made such a statement in the course of affirming a judgment in favor of the defendant-administrator on the ground that plaintiff was barred by the Statute of Limitations. It was not necessary for the court to make a determination as to the existence or extent of any probate duty of the administrator.

If, however, as in the case of *Johnson v Ford* (CC D Ore.), 109 F. 501 (1901), discussed previously in this brief, the determination of a strictly probate question is essential to plaintiff's cause of action, the court lacks jurisdiction even though conversion is alleged.

It is apparent that plaintiff is merely seeking, through the indirect device of an action for damages, to litigate in the United States District Court probate matters that can only be determined by the Probate Court of Multnomah County. The probate issues are the heart of plaintiff's case.

The opinion of the Honorable Judge in the Court below is well founded in law, and the judgment of the lower court should be affirmed.

PENDERGRASS, SPACKMAN & BULLIVANT
R. R. BULLIVANT
V. V. PENDERGRASS
JACK L. HOFFMAN

APPENDIX

OCLA 13-206. "*Jurisdiction of abolished county courts in counties over 100,000 vested in circuit courts.* Upon the taking effect of this act, all judicial jurisdiction, power and authority of the county judges and county courts which are abolished by the provisions of section 93-310, as distinguished from such power and jurisdiction as is exercised in the transaction of county business, shall then and thereafter be vested in and exercised by the circuit court of the judicial districts comprising such county, and all matters, causes and proceedings pending in such county courts shall be, and they are by this act, transferred and continued, and shall hereafter be heard and determined in the said circuit court."

NOTE: This section was repealed by Ore. Laws 1949, Ch. 530, Sec. 17, but the transfer of probate jurisdiction in Multnomah County accomplished by OCLA 13-206 was continued by the remainder of Ore. Laws 1949, Ch. 530.

OCLA 13-501. "*Jurisdiction.* The county court has the exclusive jurisdiction, in the first instance, pertaining to a court of probate; that is:

(1) To take proof of wills;

(2) To grant and revoke letters testamentary of administration and of guardianship;

(3) To direct and control the conduct, and settle the accounts of executors, administrators and guardians;

(4) To direct the payment of debts and legacies, and the distribution of the estates of intestates;

(5) To order the sale and disposal of the real and personal property of deceased persons;

(6) To order the renting, sale or other disposal of the real and personal property of minors;

(7) To take care and custody of the person and estate of a lunatic or habitual drunkard, and to appoint and remove guardians therefor; to direct and control the conduct of such guardians, and settle their accounts;

(8) To direct the admeasurement of dower."

OCLA 19-222, as amended by Ore. Laws 1949, Ch. 417. "Any heir, legatee, devisee, creditor or other person interested in the estate may apply for the removal of an executor or administrator who has ceased to be a resident of this state, or become mentally incompetent, or been convicted of any felony or a misdemeanor involving moral turpitude, or who, in any way, has been unfaithful to or neglectful of his trust to the probable loss of the applicant or the estate. Such application shall be by petition and upon notice to the executor or administrator, served in the manner provided for the service of summons, and if the court find the charge to be true, it shall give and make an order removing such executor or administrator, and revoke his letters."

OCLA 19-226. "Power of court over representative: Citation to show cause against removal: 'Removal on failure to appear or show cause. Whenever it appears probable to the court or judge that any of the causes for removal of an executor or administrator exists or have transpired, as specified in section 19-222, it shall be the

duty of such court or judge to cite such executor or administrator to appear and show cause why he should not be removed, and if he fail to appear or show sufficient cause, an order shall be made removing him and revoking his letters; and it is the duty of the court or judge thereof to exercise a supervisory control over an executor or administrator, to the end that he faithfully and diligently perform the duties of his trust according to law."

OCLA 19-401. "Inventory of estate: When and how made. An executor or administrator shall, within one month from the date of his appointment, or, if necessary, such further time as the court or judge thereof may allow, make and file with clerk an inventory, verified by his own oath, of all the real and personal property of the deceased which shall come to his possession or knowledge."

OCLA 19-602. "Exempt property: Setting apart: Use and expenditure by survivor. Upon the filing of the inventory the court or judge thereof shall make an order setting apart for the widow, widower or minor children of the deceased, if any, all the property of the estate exempt from execution, according to exemption laws in effect as of date of death of deceased. The property thus set apart is the property of such widow or widower to be used or expended by him or her in the maintenance of herself and minor children, if any; or if there be no widow or widower it is the property of the minor child; or if more than one child, then of the minor children in equal shares, to be used or expended in the nurture and educa-

tion of such child or children by the guardian thereof, as the law directs.”

OCLA 19-1001. “Semi-annual accounts: Rendering and filing: Matters to be shown. An executor or administrator shall, within the first ten days of April and October of each year, until the administration is completed and he is discharged from his trust, render an account verified by his oath, and file the same with the clerk, showing the amount of money received and expended by him, from whom received and to whom paid, with the proper vouchers for such payments, the amount of the claims presented against the estate and allowed or disallowed, and the name of the claimants of each, and any other matter necessary to show the condition of the affairs thereof; provided, however, that in case the date of the notice of the appointment of said executor or administrator shall be within sixty days next preceding the first day of April or October, the filing of such account shall be omitted until the succeeding April or October.”

OCLA 19-1002. “Proceeding if representative neglects to file an account. An executor or administrator who shall fail to file an account, as required in the last section, may be required by a citation, ordered by the court or judge, to appear and do so, either upon the application of an heir or creditor, or other person interested in the estate, or without it. If the executor or administrator refuse or neglect to appear when cited, or to file the account as required, he may be punished for a contempt, or by warrant of the judge be committed at once to close custody in the jail of the county until he consent to do so.”

OCLA 19-1003. "Order for payment of the expenses, charges, and claims. At the first term of the court after the filing of the first semi-annual account and each semi-annual account thereafter, the court shall ascertain and determine if the estate be sufficient to satisfy the claims presented and allowed by the executor or administrator, within the first six months or any succeeding period of six months thereafter, after the date of the notice of his appointment, after paying the funeral charges and expenses of administration; and if so, it shall so order and direct; but if the estate be insufficient for that purpose, it shall ascertain what per centum of such claims it is sufficient to satisfy, and order and direct accordingly."

